Supreme Court, U.S.
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No. 96-417

In The

Supreme Court of the United States

October Term, 1996

ASSOCIATION FOR RETARDED CITIZENS OF NORTH DAKOTA, et al.,

Petitioners,

v.

EDWARD T. SCHAFER, Governor of the State of North Dakota, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, based on the circumstances of this sixteen-year-old litigation, the Eighth Circuit correctly held the district court had abused its discretion in awarding petitioners, without any significant reduction, an additional $202,335.15 in attorney's fees and costs for post-judgment activities in 1993-94, particularly given petitioners' extremely aggressive approach to and complete lack of success in the litigation following the Eighth Circuit's 1991 remand of the case.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents ("the State"), who are officials of the State of North Dakota, respectfully request that this Court deny the Petition for Writ of Certiorari ("Petition") seeking review of the Eighth Circuit's decision in this case. The Eighth Circuit's opinion is reported at 83 F.3d 1008 (1996).

OPINIONS BELOW

Numerous opinions and orders have been entered in this litigation during the sixteen years the lawsuit has been pending. One particularly significant published opinion not included in the Opinions Below section of the Petition is *Association for Retarded Citizens of North Dakota v. Sinner*, 942 F.2d 1235 (8th Cir. 1991) (finding the State had presented a prima facie case of compliance with federal law and remanding the case to the district court). The following additional opinions and orders in this litigation also have been published:

Association for Retarded Citizens of North Dakota v. Olson, 561 F. Supp. 470 (D.N.D. 1981)

Association for Retarded Citizens of North Dakota v. Olson, 561 F. Supp. 473 (D.N.D. 1982), *aff'd and remanded*, 713 F.2d 1384 (8th Cir. 1983)

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Association for Retarded Citizens of North Dakota v. Schafer, 872 F. Supp. 689 (D.N.D. 1995), *rev'd in relevant part*, 83 F.3d 1008 (8th Cir. 1996)

STATEMENT OF THE CASE

Petitioners (hereinafter "ARC") instituted this class action suit in 1980 in the United States District Court for the District of North Dakota, seeking declaratory and injunctive relief regarding treatment and conditions at two North Dakota state institutions for persons with mental retardation. After a trial the district court entered a permanent injunction awarding ARC relief in the case. The Eighth Circuit affirmed that decision. The district court entered a detailed implementation order in 1984. The district court continued to exercise jurisdiction over the case through the 1980's and 1990's, requiring the State to pay ARC's attorney's fees throughout the history of the case.

After the district court dissolved the detailed implementation order in 1990, the State filed a Motion to Dissolve or Modify the Permanent Injunction, arguing, inter alia, the State was in compliance with all federal requirements and some of the relief awarded was based on state law in violation of the Eleventh Amendment and *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). The district court refused to dissolve the permanent injunction, indeed, refused to consider the State's motion. The State appealed, and in 1991 the Eighth Circuit reversed the district court's decision and remanded the case, ordering the district court to consider the State's motion and specifically finding the State had presented a

prima facie case of present compliance with the permanent injunction.

On remand, the district court impaneled a group of five special masters ("Master Panel") to consider whether the State was in compliance with the permanent injunction, which, without the detailed implementation order, basically required the State to comply with applicable federal laws. The State presented its case for compliance to the Master Panel on eleven days in November and December 1992. ARC presented testimony on three days in June 1993 and an additional twelve days in July and August 1993. The State presented rebuttal testimony on four days in July and August 1993.

In a decision issued in November 1994 the Master Panel concluded the State was in compliance with all federal law requirements and recommended the permanent injunction be dissolved. The district court adopted that decision and terminated the permanent injunction in January 1995.

In February 1995 the district court issued the order in dispute here, compelling the State to pay $202,335.15 in attorney's fees, expert witness fees, and costs. This amount represents fees and costs ARC requested for legal services during 1993 and 1994. In this order the district court awarded ARC all but $1302 of the fees and costs ARC requested.[1]

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[1] The $1302 the district court disallowed consisted of $462 for time ARC's counsel spent on legislative matters and $840 for double billing.

The district court did no significant examination of the reasonableness of ARC's fee and cost request. The district court's award included more than $63,000 in expert witness fees that, as the State argued in the Eighth Circuit, no applicable federal law authorized to be awarded, as well as other inappropriate items, such as the cost of a deposition the Master Panel had ordered ARC to pay as a sanction.

The $202,335.15 was an award of fees and costs above and beyond the hundreds of thousands of dollars the State has already paid ARC for post-judgment activities. The record below does not reflect the total amount of attorney's fees and costs the State has paid ARC in this litigation pursuant to the district court's on-going attorney's fee award.[2] Based on the court record, it can be stated that for July 1, 1992, through June 30, 1993, the State has already paid ARC $267,168.05. *See* Dist. Ct. Docket No. 823 at 2. The State did not contest payment of that amount, and it is not in dispute here. Accordingly, the record shows ARC has been paid fully for all post-judgment activities through the end of 1992, which includes almost one-half of the time spent in the Master

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[2] This is because during the vast majority of the time since the original fee award in the early 1980's through mid-1993 the State paid ARC's requested attorney's fees and costs for post-judgment activities without court involvement.

Panel hearings, and an additional $113,835.65 for activities and expenses claimed after January 1, 1993.[3]

REASONS THE PETITION SHOULD BE DENIED

1. The Petition Mischaracterizes The Eighth Circuit's Decision, Which Was Based On The Particular Facts Of This Litigation.

Contrary to the Petition's implication, the Eighth Circuit did not find ARC was entitled to *no* fee for post-judgment monitoring, or even *no* fee for the work in the hearings before the Master Panel. What the Eighth Circuit concluded was that the more than $113,000 the State already paid ARC for post-judgment activities in 1993 and 1994, in addition to the uncontested payments the State paid ARC before 1993, resulted in ARC being "fully compensated for [its] reasonable and necessary post-judgment efforts following [the Eighth Circuit's] 1991 remand." Pet. App. at App. 10. In other words, the Eighth Circuit reduced, but did not eliminate, the award of fees and costs to ARC for ARC's unsuccessful post-judgment activities.

Further, contrary to the Petition's implication, the Eighth Circuit did not establish any bright line rule that a plaintiff must achieve "complete success" at each stage of

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[3] The State paid ARC $113,835.65 for the first two quarters of 1993 and refused to pay ARC an additional $66,600 requested for that period. The unpaid $66,600 – less the $1302 the district court disallowed – is included in the $202,335.15 district court fee award the Eighth Circuit reversed and which ARC is seeking to have reinstated.

compliance proceedings to be considered a prevailing party. Instead, as discussed below, the Eighth Circuit applied the "reasonable and necessary" test of *Hensley v. Eckerhart*, 461 U.S. 424 (1983), to conclude that, under the facts of this case, ARC had already been compensated appropriately for the post-judgment activities in which it had been involved since the Eighth Circuit's 1991 remand.

2. The Eighth Circuit's Decision Does Not Conflict With Prior Decisions Of This Court in *Pennsylvania v. Delaware Valley Citizens' Council* and *Hensley v. Eckerhart*.

In *Hensley v. Eckerhart* this Court stated that the "starting point" for attorney's fee awards under 42 U.S.C. § 1988 is the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." 461 U.S. at 433. The Court found, however, this mathematical calculation "does not end the inquiry." *Id.* at 434. "[H]ours that are excessive, redundant, or otherwise unnecessary" should be excluded. *Id.* Also, no award should be made for work on distinct, unsuccessful claims, *id.* at 434-35, and "[a] reduced fee award is appropriate if the relief, however significant, is limited," *id.* at 440. "[T]he extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees." *Id. See also Farrar v. Hobby*, 506 U.S. 103, 114 (1992); *Texas State Teachers Ass'n v. Garland Ind. Sch. Dist.*, 489 U.S. 782, 789-90 (1989). The Court opined in *Hensley*:

> If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a

> reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. [T]he most critical factor is the degree of success obtained.

461 U.S. at 436.

Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546 (1986), basically concerned the application of the *Hensley* standard to certain specific factual situations, i.e., whether fees could be awarded for related administrative proceedings or fees could be enhanced based either on superior performance or a risk of not prevailing on the merits. None of these specific issues are relevant to the instant dispute. However, the general approach to the fee issue used in *Delaware Valley* actually supports the Eighth Circuit's decision here.

Delaware Valley demonstrates "prevailing party" status does not give a plaintiff carte blanche to charge the opposing side for all post-judgment activities, no matter how excessive, redundant, or unnecessary those activities may be. The Court held that to be compensable "the work must be 'useful and of a type ordinarily necessary' to secure the final result obtained from the litigation." 478 U.S. at 561 (quoting *Webb v. Board of Educ. of Dyer County*, 471 U.S. 234, 243 (1985)).[4]

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[4] In *Delaware Valley* the Court noted with apparent approval that the district court had disallowed compensation for more than one-third of the requested hours on the grounds the hours were "unnecessary, unreasonable, or unproductive." *See* 478 U.S. at 544 n.2, 566-67.

Further, in *Delaware Valley* the Court considered the propriety of an attorney's fee award by looking at the fee requests in that lengthy litigation in "phases," noting that "[n]ot only is this the method used by the parties and followed by both lower courts, but it is a system for analyzing requests for attorney's fees and costs that appears to be useful in protracted litigation." 478 U.S. at 549. Hence, the Court's analysis in *Delaware Valley* supports the Eighth Circuit's method of analyzing the case below by considering the circumstances and fees awarded in the post-1991 remand "phase" of this protracted litigation. Under *Delaware Valley* just because ARC prevailed in the early 1980's does not mandate an award of *all* fees and costs ARC incurred in completely unsuccessful post-judgment activities in a distinctly new phase of the litigation after the 1991 remand.

The Eighth Circuit's analysis – unlike the district court decision the Eighth Circuit reversed – is consistent with the principles enunciated in *Hensley* and *Delaware Valley*.

The Eighth Circuit acknowledged the district court expected ARC to participate in the proceedings before the Master Panel and that, "in such situations, even largely unsuccessful defensive efforts may be compensable." Pet. App. at App. 6. The court noted, though, that ARC chose to present an extremely aggressive case to the panel, constituting "in substance, the assertion of new claims for relief." Pet. App. at App. 6 – App. 7. The Eighth Circuit found the Master Panel's decision constituted "a complete rejection of [ARC's] position [and t]hus, the relative

success factor in the *Hensley* equation suggests that plaintiffs' fee award must be reduced." Pet. App. at App. 8.

The court also considered "the other key component of the *Hensley* equation – exclusion of 'hours that are excessive, redundant, or otherwise unnecessary,' " finding ARC's fees were "overkill," Pet. App. at App. 8-App. 9. The court noted examples of excessive or unnecessary work, such as extensive tours of State facilities by an attorney who had been litigating the case involving those facilities for more than ten years. Pet. App. at App. 8.

The Eighth Circuit concluded the substantial sums ARC had already received for its post-judgment activities during the period in question were full compensation for any reasonable, necessary, and useful post-judgment activities. *See* Pet. App. at App. 10. This decision is consistent with *Hensley* and *Delaware Valley*.

Indeed, a contrary conclusion would give plaintiffs who originally prevail in civil rights litigation a blank check and no motivation to participate in bringing about a reasonable conclusion to such litigation. Congress could not have intended to approve perpetual fee awards by enacting 42 U.S.C. § 1988.

3. The Eighth Circuit's Decision Does Not Conflict With Decisions Of Other Circuits.

The Eighth Circuit's decision is not in conflict with the decisions of other circuits. Specifically, it does not

conflict with the cases upon which the Petition relies to argue such a conflict exists. *See* Cert. Pet. at 3-4.[5]

In each case upon which ARC relies the court applied the same test the Eighth Circuit applied here: Each court considered whether an attorney's fee award was reasonable and necessary under the circumstances. *See Joseph A. v. New Mexico Dep't of Human Servs.*, 28 F.3d 1056, 1060-61 (10th Cir. 1994); *Plyler v. Evatt*, 902 F.2d 273, 277-81 (4th Cir. 1990); *Ustrak v. Fairman*, 851 F.2d 983, 987-91 (7th Cir. 1988); *Brewster v. Dukakis*, 786 F.2d 16, 18-19 (1st Cir. 1986); *Turner v. Orr*,[6] 785 F.2d 1498, 1501, 1504 (11th Cir. 1986).

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[5] Similarly, the Eighth Circuit's decision does not conflict with any of the other Court of Appeals' decisions cited elsewhere in the Petition. *See Diaz v. Romer*, 961 F.2d 1508, 1512 (10th Cir. 1992) ("*reasonable* monitoring of the court's decrees . . . are compensable services") (emphasis added); *Stewart v. Gates*, 987 F.2d 1450, 1452 (9th Cir. 1993) ("Compensable work on post-judgment proceedings must be 'useful' and of a type 'ordinarily necessary' to secure the litigation's final result. . . . It is an abuse of discretion to award fees to an unappointed monitor for pursuing meritless claims."); *Duran v. Carruthers*, 885 F.2d 1492, 1497 (10th Cir. 1989) ("district court did not give the plaintiffs' attorneys *carte blanche*" but reduced fee requested significantly); *Norman v. Housing Auth. of Montgomery*, 836 F.2d 1292, 1302 (11th Cir. 1988) ("in determining reasonable hours the district court must deduct time spent on discrete and unsuccessful claims"); *Keith v. Volpe*, 833 F.2d 850, 859 (9th Cir. 1987) (district court "extensively analyzed" fee application for reasonableness, disallowing almost twenty percent of fees claimed).

[6] The Eleventh Circuit's analysis of the attorney's fee issue in *Turner* did not focus on the reasonableness issue, but on the interpretation of the parties' intent in the consent decree. *See* 785 F.2d at 1501-04.

The cited opinions, like the Eighth Circuit's decision here, followed the *Hensley* teaching that an important factor in the attorney's fee determination is the plaintiff's degree of success – throughout the proceedings. As the Seventh Circuit wrote in *Ustrak*,

> A civil rights plaintiff who, having won a judgment in the district court, appeals, seeking a greater victory – and fails utterly in his appeal – will be hard pressed to demonstrate an entitlement to his attorney's fees on appeal, even though he remains the prevailing party in the underlying litigation.

851 F.2d at 990. In *Plyler* the Fourth Circuit noted that its

> holding should not be construed as guaranteeing attorneys' fees after resolution of every dispute involving the consent decree. The initial status of "prevailing party" does not entitle appellees to compensation when resistance to modification is unsuccessful and the position taken was not essential to the preservation of the integrity of the consent decree as a whole.

902 F.2d at 281. The *Brewster* court also recognized there must be limits on post-judgment attorney's fees, noting that "[m]issing the refining fire of the basic litigation, plaintiffs' attorney may slip into a mode of spending too much time on too many matters, with the result that the decree institutionalizes the attorney, as well as the system." 786 F.2d at 18.

To the extent the results in the decisions ARC cites are not identical to the result here, those differences can be explained by the different facts presented to those

courts. Attorney's fee determinations are, by necessity, case and fact specific.

Perhaps the most important factual distinction is that none of the cases ARC cites discussed upholding a district court award where the district court had awarded virtually *all* fees requested, without any significant reduction. Indeed, in almost all of the cases upon which ARC relies the Court of Appeals was reviewing an award the district court already had reduced significantly. *See Stewart*, 987 F.2d at 1451-52 (district court had reduced requested award by about twenty-four percent); *Plyler*, 902 F.2d at 276 ("[i]n computing the award, the [district] court accepted some of [defendant's] arguments for adjustments in the number of hours billed . . . and two lawyers received no fees at all"); *Duran*, 885 F.2d at 1493, 1497 (district court had reduced one award by almost eighteen percent and a second award by more than fifteen percent); *Ustrak*, 851 F.2d at 986 (district court reduced the number of hours requested by one-third "to reflect the modest results of the litigation"); *Keith*, 833 F.2d at 853 (district court had disallowed almost twenty percent of the fees claimed); *Brewster*, 786 F.2d at 17 ("district court awarded $132,639.55, a reduction of forty-four percent").[7]

By contrast, here the district court disallowed only $1302, which is six-tenths of one percent of the more than

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[7] The Tenth Circuit's decision in *Joseph A.* contains no details of the basis for the district court's award and whether that amount was reduced; indeed, the Tenth Circuit's reversal in *Joseph A.* was based on the lower court's failure to elucidate the basis for the award. *See* 28 F.3d at 1061-62.

$200,000 in fees ARC claimed. The $202,335.15 the district court awarded was in addition to the substantial sums the State had already paid ARC for post-judgment activities, including $267,168.05 the State paid ARC for July 1, 1992, through June 30, 1993.

The Eighth Circuit's decision, based on the facts presented in this case, created no conflict among the circuits.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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